No. 98-1503

Supreme Court, U.S.
FILED
JUN 14 1999
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM 1998

FIRST FEDERAL BANK OF CALIFORNIA,
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
Respondent.

Connie Schultz,
Real Party In Interest.

On Petition for Review to the Supreme Court of California

PETITIONER'S REPLY MEMORANDUM

STEVEN N. RICHMAN, Counsel of Record
STEVEN N. RICHMAN
LAURA E. MCSWIGGIN
EPPORT & RICHMAN
10100 Santa Monica Boulevard
Suite 1450
Los Angeles, California 90017
Counsel for Petitioner

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

TABLE OF CONTENTS

		Page
I.	SUMMARY OF ARGUMENT	1
II.	THE CALIFORNIA ORDER IS FINAL	3
III.	DELAY WILL SERIOUSLY ERODE FEDERAL POLICY	5
IV.	THE STATE LAW DEFAMATION CLAIM CANNOT DEFEAT JURISDICTION AS TO THE FEDERAL ISSUE	6
V.	SCHULTZ FAILS TO ADDRESS THE PETITION ON ITS MERITS	7
VI.	CONCLUSION	8

TABLE OF AUTHORITIES

Cases

Page(s)

Aronson v. RTC 38 F.3d 1110, 1112 (9th Cir. 1994). 7

Asarco, Inc. v. Kadish, 490 U.S. 605, 612, 109 S.Ct. 2037, 2042 (1989) 2,6

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 1226 (1949) 1,3

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477, 95 S.Ct. 1029, 1037 (1975) 2,3,4,5,6

Duquesne Light Co. v. Barasch, 488 U.S. 299, 306, 109 S.Ct. 6709, 615 (1989) 1,2,4

Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 179, 108 S.Ct. 1704, 1709 (1988) 2,4,5

Hillsborough County, Fla. v. Automated Medical Labs, Inc., 471 U.S. 707, 712 (1985) 7

Mercantile National Bank v. Langdeu, 371 U.S. 555, 558, 83 S.Ct. 520, 522 (1963) 4

Mills v. Alabama, 384 U.S. 214, 217-218, 86 S.Ct. 1434, 1436 (1966) 2,3,5

Mississippi Power & Light Company v. Mississippi ex Rel Michael C. Moore, (1988) 487 U.S. 354, 370 Fn. 11, 108 S.Ct. 2428, 2438, Fn. 11 2

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124, 65 S.Ct. 1475, 1478 (1945) 3,6

Statutes

	Page(s)
United States Code	
12 U.S.C. Section 1257	3
28 U.S.C. Section 1257	2
12 U.S.C.A. 1461 est. seq.	7

Regulations

	Page(s)
C.F.R § 545.2	7
C.F.R § 563.39	2

The Opposition filed by Respondent Connie Schultz ("Schultz") is defective for two reasons. First, it mischaracterizes the jurisdictional issue by attempting to argue that the decision of the California Supreme Court is not final which, as noted below, is legally incorrect. Second, the Opposition fails to address the merits of the Petition itself, for the simple reason that Schultz cannot do so in good faith (as her claim is expressly barred by federal law).

I.

SUMMARY OF ARGUMENT

1. Federal law bars claims against federal savings associations based on unwritten employment contracts. As such federal law prohibits Schultz from even bringing this claim against First Federal.

2. Since federal law prohibits this claim in its entirety, the Motion for Summary Adjudication of First Federal, seeking to enforce the federal prohibition, should have been granted.

3. Because the California Supreme Court declined to recognize the federal prohibition, the result is now preordained. First Federal must now defend itself on an unwritten employment contract claim, even though the claim is absolutely barred by federal law. First Federal must now utilize its capital (which is governed, regulated and insured by the federal government) to defend against a lawsuit that is expressly forbidden by the federal government. Therefore, this Court has jurisdiction. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1226 (1949); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 306, 109 S.Ct. 6709, 615 (1989).

4. Since the California Supreme Court declined to honor the federal bar which prohibited the bringing of such a claim, the decision of the California Supreme Court is final

within the meaning of 28 U.S.C. Section 1257. That ruling determined the federal issue at hand (e.g. the federal bar). Therefore, this Court has jurisdiction. *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 477, 95 S.Ct. 1029, 1037 (1975); *Duquesne Light Co. v. Barasch,* 488 U.S. 299, 306, 109 S.Ct. 609, 615 (1989).

5. It has long been held that the existence of further state proceedings (here, the state law defamation claim) cannot defeat this Court's jurisdiction as to a federal issue. *Mississippi Power & Light Company v. Mississippi ex Rel Michael C. Moore,*(1988) 487 U.S. 354, 370 fn. 11, 108 S.Ct. 2428, 2438, fn. 11; *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 477, 95 S.Ct. 1029, 1037 (1975); *Mills v. Alabama,* 384 U.S. 214, 217-218, 86 S.Ct. 1434, 1436 (1966); *Asarco, Inc. v. Kadish,* 490 U.S. 605, 612, 109 S.Ct. 2037, 2042 (1989).

6. It has also long been held that jurisdiction is properly exercised when a state court decision erodes an important federal policy. The absolute disregard of federal law demonstrated by the California courts — especially in the subject area, in which Congress has expressly stated that federal law preempts the entire field — is not merely an erosion: It is a complete abrogation and disregard of federal policy. *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 179, 108 S.Ct. 1704, 1709 (1988).

7. Finally, it is important to note that the Opposition is limited exclusively to issues of jurisdiction. The Opposition fails to address: (a) the federal bar itself; (b) the express Congressional preemption of the entire field; or (c) the Supremacy Clause of the Constitution. Clearly, the Respondent failed to address these issues because she cannot do so. The abject disregard of federal law by the California judiciary is indefensible.

II.

THE CALIFORNIA ORDER IS FINAL

As this Court discussed in great detail in *Cox Broadcasting Corporation v. Cohn, supra,* 420 U.S. at 477, four situations exist in which, despite the existence of further state court proceedings, the Supreme Court treats the decision on a federal issue as a "final judgment" for purposes of 12 U.S.C. Section 1257. These are situations where the state court proceedings require no further review of the subject federal question, and where a decision of the highest state court renders the federal issue "preordained." Further, the exercise of jurisdiction is appropriate when immediate (rather than delayed) review is the best way to avoid "the mischief of economic waste and delayed justice." *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 124, 65 S.Ct. 1475, 1478 (1945).

When a state court decision on a federal issue is conclusive, the judgment of the state court on the federal issue is deemed final, despite the existence of further proceedings — even when a trial has yet to take place in the state courts. *Mills v. Alabama,* 384 U.S. 214, 217-18, 86 S.Ct. 1434, 1436 (1966). The California Supreme Court has made a final determination (in the form of a denial of First Federal's Petition seeking to enforce federal law) that federal law does not bar Schultz from suing First Federal for an unwritten employment contract. This is a conclusive, final decision.

The functional effect of the denial by the California Supreme Court of First Federal's Petition is to disregard the federal bar which prohibits Schultz' claim. The practical result of this act cannot be disregarded: It forces First Federal to defend against a claim which is barred by federal law. It is hornbook law that the requirement of finality is to be given a practical rather than a technical construction. *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541,

546, 69 S.Ct. 1221, 1226 (1949). When the California Supreme Court denied First Federal's Petition, it effectively determined that the federal bar does not bar anything at all. This is a final decision.

As explained in *Duquesne Light Co. v. Barasch,* 488 U.S. 299, 306, 109 S.Ct. 609, 615 (1989), an issue may be considered as finally adjudicated when the ruling of a state supreme court leaves no doubt regarding its effect. Here, the effect of the California Supreme Court decision forces First Federal to defend against Schultz' claim at the trial court level, despite the fact that it is barred by federal law. There can be no doubt as to the effect of the action (or inaction) of the California Supreme Court.

Jurisdiction exists "where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceeding still to come." *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 179, 108 S.Ct. 1704,1709 (1988); citing *Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. at 482-483, 95 S.Ct. at 1040. As in *Goodyear,* if the California Supreme Court ruling is reversed, the federal bar will be enforced, precluding any further proceedings on this cause of action.

As demonstrated in *Mercantile National Bank v. Langdeu,* 371 U.S. 555, 558, 83 S.Ct. 520, 522 (1963), this Court has previously accepted jurisdiction where the exercise of such jurisdiction serves the policy of the federal statute and allows the litigants to avoid "long and complex litigation which may all be for naught . . ." Forcing First Federal to defend against a claim which cannot legally exist is the ultimate example of "long and complex litigation which will all be for naught." It is the exact "mischief of economic waste" which concerned this Court in *Radio Station WOW, Inc., supra.*

It "would not only be an inexcusable delay of the benefits Congress intended to grant . . . but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets" to force First Federal to proceed with trial on this claim. *Mills v. Alabama*, *supra*, 384 U.S. at 217-218, 86 S.Ct. at 1436. First Federal should not be forced to spend its capital (which is governed, regulated and insured by the federal government) in defending against a claim which is expressly forbidden by federal law.

III.

DELAY WILL SERIOUSLY ERODE FEDERAL POLICY

As explained in *Cox Broadcasting*, there are certain circumstances where the failure to immediately review a state court decision might seriously erode federal policy. *Cox Broadcasting v. Cohn*, *supra*, 420 U.S. at 483, 95 S.Ct. at 1040. Such is the case herein: Congress has determined that federal savings associations are to remain free from lawsuits based upon alleged unwritten employment contracts. This policy is not just seriously eroded by the California courts' refusal to uphold the federal defense, but it is abrogated entirely.

When a refusal to immediately review a state court decision might seriously erode federal policy, the Supreme Court has exercised jurisdiction to decide the federal issue. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 179, 108 S.Ct. 1704, 1709 (1988), citing *Cox Broadcasting Corp. v. Cohn*, *supra*, 420 U.S. at 482-483, 95 S.Ct. at 1040. The actions of the California judiciary, ignoring both (a) the express mandate of the United States Congress to preempt the field, and (b) ignoring the federal regulation which expressly bars this cause of action, erodes federal policy in

the most egregious of manners possible — it simply disregards it.

IV.

THE STATE LAW DEFAMATION CLAIM CANNOT DEFEAT JURISDICTION AS TO THE FEDERAL ISSUE

The only federal issue in question is whether claims for unwritten employment contracts against federal savings associations are barred by federal law. The existence of further state court proceedings below (e.g., the defamation claim) is irrelevant. The claim for defamation, which is the sole remaining claim, does not give rise to any federal question. Therefore, its existence is immaterial to the issue of this Court's jurisdiction on the federal claim. *Asarco, Inc. v. Kadish*, 490 U.S. 605, 612, 109 S.Ct. 2037, 2042 (1989); quoting *Cox Broadcasting Corp. v. Cohn*, *supra*, 420 U.S. at 480, 95 S.Ct. at 1038; further quoting *Radio Station WOW, Inc. v. Johnson*, *supra*, 326 U.S. at 127, 65 S.Ct. at 1480.

Further, the statement in Schultz' Opposition (that a trial on the exact same facts must still take place because Schultz has alleged that she was defamed by her subordinate) is disingenuous at best. The elements of defamation are clearly separate and distinct from the elements of a claim for breach of an implied-in-fact employment contract. Further, issues and evidence are vastly different and, with all likelihood, fail to overlap. Therefore, the fact that Schultz may elect to proceed on her defamation claim should have no bearing on the important federal issues raised by this Petition.

V.

SCHULTZ FAILS TO ADDRESS THE PETITION ON ITS MERITS

Glaringly omitted from the Opposition is any discussion on the merits of the Petition. This is due to the fact that Schultz cannot in good faith discuss the merits: Federal law expressly prohibits claims for breach of implied-in-fact contracts by employees of federally insured financial institutions. This bar is clear and unequivocal. 12 C.F.R. § 563.39; *Aronson v. RTC* 38 F.3d 1110, 1112 (9th Cir. 1994). Further, this area of law has been preempted by both Congressional mandate and the Supremacy Clause of the Constitution. 12 U.S.C.A. 1461 et. seq.; 12 C.F.R. § 545.2; *Hillsborough County, Fla. v. Automated Medical Labs, Inc.*, 471 U.S. 707, 712 (1985). Schlulz' failure to even address these issues further calls for the Court's granting of the Petition. Simply put, there is no justifiable reason why First Federal should be forced to bear the expense of defending a claim which is barred on its face by federal law.

VI.

CONCLUSION

Based upon the foregoing, this Court clearly has jurisdiction to hear First Federal's Petition. Due to the absolute bar created by federal law and the harm that would be caused to First Federal if it is required to defend the subject claim, First Federal respectfully requests that its Petition be immediately granted.

Date: June 9, 1999

EPPORT & RICHMAN, LLP
Attorneys at Law
By: Steven N. Richman
Attorneys for Petitioner
FIRST FEDERAL BANK OF CALIFORNIA